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AT SEATTLE  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROSOFT CORPORATION, a  
Washington corporation,

Plaintiff,

v.

LEONID "LEO" RADVINSKY, an  
individual, CYBERPOWER PTY, LTD., a  
foreign corporation, CYBERTANIA, INC.,  
an Illinois corporation, ACTIVSOFT, INC.,  
an Illinois corporation, and JOHN DOES 1-  
20,

Defendants.

No **CV4 2033**

COMPLAINT FOR DAMAGES AND  
INJUNCTIVE RELIEF



04-CV-02033-CMP

Plaintiff Microsoft Corporation ("Microsoft") brings this action against LEONID  
"LEO" RADVINSKY, an individual, CYBERPOWER PTY, LTD., a foreign corporation,  
CYBERTANIA, INC., an Illinois corporation, ACTIVSOFT, INC., an Illinois corporation,  
and JOHN DOES 1-20.

**I. JURISDICTION AND VENUE**

1. This is an action for violations of the federal CAN-SPAM Act of 2003 (15  
U.S.C. §7701 et seq.) and other state and federal causes of action. Passed by Congress and  
signed into law in December 2003, the CAN-SPAM Act is new, comprehensive legislation

COMPLAINT FOR DAMAGES AND  
INJUNCTIVE RELIEF - 1

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1 aimed at curbing the growing abuse of unsolicited commercial electronic mail by e-mail  
2 marketers.

3       2. In this action, Microsoft seeks damages and injunctive relief to remedy  
4 defendants' unauthorized use of Microsoft's computers and computer systems to deliver  
5 millions of misleading and deceptive commercial e-mail messages, or "spam," in violation of  
6 federal and state law and Microsoft's policies.

7       3. Since at least early 2003, and continuing into 2004, the Defendants have sent  
8 hundreds of millions of illegal e-mail messages to Microsoft's e-mail subscribers advertising  
9 either "Free Grants" or adult-oriented websites. The e-mailing practices of this spam group  
10 are sophisticated, and are in violation of state and federal law. The Defendants route their e-  
11 mail messages through open proxies and hijacked computers in countries around the world,  
12 use misleading transmission information and subject lines, and take other actions to disguise  
13 their true identities.

14       4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 28  
15 U.S.C. § 1338(a). The Court has supplemental jurisdiction over the state law claims pursuant  
16 to 28 U.S.C. § 1367.

17       5. The Court has personal jurisdiction over the Defendants, who have engaged in  
18 business activities in and directed to Washington, have committed a tortious act within the  
19 state, have used personal property in the state, and have purposefully availed themselves of  
20 the opportunity to conduct commercial activities in this forum.

21       6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b), because  
22 substantial part of the events or omissions giving rise to the claims pled herein occurred in the  
23 Western District of Washington.

## 24                                   II. THE PARTIES

25       7. Plaintiff Microsoft is a Washington corporation with its principal place of  
26 business in Redmond, Washington.

8. Defendant Leonid "Leo" Radvinsky ("Radvinsky") is an individual residing in Illinois. Radvinsky is the sole owner and operator of defendants Cyberpower, Cybertania, and ActivSoft. Radvinsky, either himself or through and in connection with his companies, is or was the registered owner and operator of numerous internet websites advertising "Free Grants," and adult-oriented content. Among the hundreds of websites owned and operated by Radvinsky are the websites <www.grantgiveaways.com>, <www.freegrantsnow.com>, <www.mygrantnow.org>, <www.securedgrant.com> and <www.yourfreegrant.com>. During the times referenced herein, Radvinsky promoted his websites, products and services through the sending of bulk, unsolicited e-mail, or "spam."

9. Defendant Cyberpower Pty., Ltd. ("Cyberpower") is a foreign corporation.

10. On information and belief, defendant Cybertania, Inc. ("Cybertania") is an Illinois corporation with its principal place of business in Glenview, Illinois.

11. On information and belief, defendant ActivSoft, Inc. is an Illinois corporation with its principal place of business in Glenview, Illinois.

12. Microsoft is unaware of the true names and capacities of defendants sued herein as DOES 1-20 and, therefore, sues these defendants by such fictitious names. Microsoft will amend this complaint to allege their true names and capacities when ascertained. Microsoft is informed and believes and therefore alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that Microsoft's injuries as herein alleged were proximately caused by such defendants. These fictitiously named defendants, along with Radvinsky, Cyberpower, Cybertania and ActivSoft are herein referred to collectively as "defendants."

13. The actions alleged herein to have been undertaken by the defendants were undertaken by each defendant individually, were actions that each defendant caused to occur, were actions that each defendant authorized, controlled, directed, or had the ability to authorize, control or direct, and/or were actions each defendant assisted, participated in, or

1 otherwise encouraged, and are actions for which each defendant is liable. Each defendant  
 2 aided and abetted the actions of the defendants set forth below, in that each defendant had  
 3 knowledge of those actions, provided assistance and benefited from those actions, in whole or  
 4 in part. Each of the defendants was the agent of each of the remaining defendants, and in  
 5 doing the things hereinafter alleged, was acting within the course and scope of such agency  
 6 and with the permission and consent of other defendants. Each of the defendants knew, or  
 7 consciously avoided knowing, that other defendants had or would engage in a pattern or  
 8 practice that violated the CAN-SPAM Act of 2003 and the other statutes referenced herein.

### 9 **III. NATURE OF MICROSOFT'S INTERNET E-MAIL SERVICES**

10 14. Microsoft owns and operates interactive computer services that enable its  
 11 customers to, among other things, access the Internet and exchange electronic mail ("e-mail")  
 12 on the Internet. Microsoft owns and maintains computers and other equipment, including  
 13 specialized computers or "servers" that process e-mail messages and otherwise support its e-  
 14 mail services. Microsoft maintains this equipment in Washington and California, among  
 15 other states. E-mail sent to and from Microsoft's customers is processed through and stored  
 16 on these computers. Microsoft is an internet service provider ("ISP"), a provider of "Internet  
 17 Access Service" as defined by 15 U.S.C. §7702(11), and an "interactive computer service" as  
 18 defined by RCW 19.190.010. Microsoft's computers and computer systems are "protected  
 19 computers" under the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030(e)(2).

20 15. One of Microsoft's services is "MSN Hotmail" which provides free and  
 21 subscription based email on the Internet through a web-based e-mail service that can be  
 22 accessed at [www.hotmail.com](http://www.hotmail.com). MSN Hotmail allows account-holders to exchange e-mail  
 23 messages with any other e-mail user who has an Internet e-mail address throughout the world.  
 24 MSN Hotmail has millions of registered accounts, whose users all have unique e-mail  
 25 addresses ending in "@hotmail.com."

1           16. Another of Microsoft's services is "MSN Internet Access" (referred to herein  
2 as "MSN") which provides free and subscription-based e-mail services that can be accessed  
3 on the web or via Microsoft's proprietary network. MSN allows account-holders to exchange  
4 e-mail messages with any other e-mail user who has an Internet e-mail address throughout the  
5 world. MSN has millions of registered accounts, whose users all have unique e-mail  
6 addresses ending in "@msn.com."

7           **IV. SPAM AND THE PURPOSES BEHIND THE FEDERAL CAN-SPAM ACT**

8           17. The United States Congress, in passing the CAN-SPAM<sup>1</sup> Act of 2003,  
9 concluded that "[u]nsolicited commercial e-mail, commonly known as 'spam', has quickly  
10 become one of the most pervasive intrusions in the lives of Americans." Indeed, Congress  
11 estimated that by the end of 2003, if not sooner, spam would account for over 50% of all e-  
12 mail. This is in sharp contrast to two years earlier when spam only accounted for 8% of all e-  
13 mail. Congress has concluded that the rate at which spam is increasing is "reaching critically  
14 high levels." In fact, in 2003, an estimated 2 trillion spam messages were expected to be sent  
15 over the Internet.

16           18. In addition to plaguing recipients by its sheer volume, spam is also notoriously  
17 deceptive in form and content. In April 2003, the Federal Trade Commission found that 66%  
18 of all spam contains "some kind of false, fraudulent, or misleading information, either in the  
19 e-mail's routing information, its subject line, or the body of its message." In fact, the FTC  
20 found that "one-third of all spam contains a fraudulent return e-mail address that is included  
21 in the routing information (known as the 'header') of the e-mail message". Congress found  
22 that falsified headers "not only trick ISP's increasingly sophisticated filters," but also "lure  
23 consumers into mistakenly opening messages from what appears to be people they know."

24  
25  
26 <sup>1</sup> CAN-SPAM is an acronym for "Controlling the Assault of Non-Solicited Pornography and  
Marketing Act of 2003".

1           19. Congress also found that not only do spammers use false sender information,  
2 but they also use false or misleading subject lines. According to Congress, the FTC found  
3 that 42% of spam contains misleading subject lines that "trick the recipient into thinking that  
4 the e-mail sender has a personal or business relationship with the recipient." Congress  
5 provided examples of this type of false or misleading subject line: "Hi, it's me" and "Your  
6 order has been filled."

7           20. The economic impact of spam is enormous. Congress noted that a 2001  
8 European Union study found that "spam costs Internet subscribers worldwide \$9.4 billion  
9 each year." Congress also noted that the estimated costs "to United States businesses from  
10 spam in lost productivity, network system upgrades, unrecoverable data, and increased  
11 personnel costs, combined, will top \$10 billion in 2003." Of that amount, approximately \$4  
12 billion will be associated with lost employee productivity.

13           21. With these findings as a backdrop, the United States Congress passed the  
14 CAN-SPAM Act. In so doing, Congress provided four specific purposes of the Act: "(i)  
15 prohibit senders of electronic mail (e-mail) for primarily commercial advertisement or  
16 promotional purposes from deceiving intended recipients or Internet service providers as to  
17 the source or subject matter of their e-mail messages; (ii) require such e-mail senders to give  
18 recipients an opportunity to decline to receive future commercial e-mail from them and to  
19 honor such requests; (iii) require senders of unsolicited commercial e-mail (UCE) to also  
20 include a valid physical address in the e-mail message and a clear notice that the message is  
21 an advertisement or solicitation; and (iv) prohibit businesses from knowingly promoting or  
22 permitting the promotion of, their trade or business through e-mail transmitted with false or  
23 misleading sender or routing information."

24           22. As Congress recognized, the growth in unsolicited commercial electronic mail  
25 imposes significant monetary costs on providers of Internet access services that carry and  
26 receive such mail, as there is a finite volume of mail that such providers can handle without

1 further investment in infrastructure. The sheer volume of spam is threatening to overwhelm  
2 not only the average consumer's in-box, but also the network systems of Internet access  
3 service providers.

4 23. Microsoft has invested substantial time and money in efforts to protect itself  
5 and its equipment from spam and the spammers who promote and profit from spam, as well as  
6 in efforts to protect its registered users worldwide from receiving spam.

7 24. Microsoft has a clearly articulated policy prohibiting the use of its services for  
8 junk e-mail, spamming, or any unsolicited messages (commercial or otherwise). Microsoft's  
9 policies also prohibit automated queries of any sort, harvesting or collection of e-mail  
10 addresses, and any use of the services that is not personal and non-commercial. These  
11 policies are included in the Terms of Use for MSN and MSN Hotmail, which can be accessed  
12 via a clearly marked link on [www.msn.com](http://www.msn.com), as well as on the home pages for each of the  
13 services.

#### 14 V. DEFENDANTS' UNLAWFUL CONDUCT

15 25. Microsoft is informed and believes, and on that basis alleges, that defendants  
16 have been—and are currently involved in—widespread spamming by sending misleading,  
17 deceptive and unsolicited commercial e-mail to MSN Hotmail account holders.

18 26. Microsoft is informed and believes, and on that basis alleges, that defendants  
19 own or operate a number of Internet domains, by which they advertise their products or  
20 services including, but not limited to, the domains identified above.

21 27. Microsoft is informed and believes, and on the basis alleges, that its MSN  
22 Hotmail service has received millions of unsolicited commercial e-mail messages from  
23 defendants advertising their domains, and offering products or services relating to "Free  
24 Grants" and adult-content websites.



28. Many of those e-mail messages contain false or misleading "From" lines. By placing false names in place of the name of the true sender, defendants obscure the point of origin and transmission path of the e-mail.

29. Many of those e-mail messages are sent through open proxies, or hijacked computers, thereby disguising the true sender of the e-mail messages.

30. Many of those e-mail messages purport to originate from the hotmail.com and msn.com domains when, in fact, they did not. Defendants did not have permission to use Microsoft's hotmail.com and msn.com domain names in that fashion.

31. Many of defendants' commercial e-mails use fictional domain names or use the domain names of other innocent third-parties. Microsoft is informed and believes, and on that basis alleges, that defendants did not have permission to use those domain names.

32. Many of those e-mail messages contain false and misleading subject lines.

33. Microsoft has been adversely affected by defendants' actions. As a result of defendants' activities, Microsoft's computer equipment and servers were required to process millions of improper spam e-mails, as well as "bounce back" e-mails which had been sent by defendant to non-existent, out-dated or incorrect e-mail addresses. This significant number of e-mails has taken up substantial amount of Microsoft's finite computer space, threatens to delay and otherwise adversely affect MSN Hotmail subscribers in sending and receiving legitimate e-mail, and has resulted in and continues to result in significant costs to Microsoft.

#### COUNT I

(Violation of the Federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003—"CAN-SPAM" (15 U.S.C. § 7704(a)(1)))

34. Microsoft realleges paragraphs 1-33 of this Complaint as if fully set forth herein.

35. Defendants initiated the transmission, to protected computers, of commercial e-mail messages that contained, or were accompanied by, header information that is materially false or materially misleading.

COMPLAINT FOR DAMAGES AND  
INJUNCTIVE RELIEF - 8

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36. Defendants' actions were willful and knowing.

37. As a result of defendants' actions, Microsoft has been damaged in an amount to be proven at trial.

38. Defendants' actions violated 15 U.S.C. § 7704(a)(1), and entitle Microsoft to injunctive relief, statutory damages and aggravated damages because of defendants' willful and knowingly violation of the CAN-SPAM Act.

**COUNT II**  
**(Violation of the Federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003—"CAN-SPAM" (15 U.S.C. § 7704(a)(2, 3 and 5)))**

39. Microsoft realleges paragraphs 1-38 of this Complaint as if fully set forth herein.

40. Defendants engaged in a pattern or practice of initiating, to protected computers, commercial e-mail messages that:

a) contained subject headings that defendants knew, or reasonably should have known, were likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the messages;

b) failed to contain a functioning return e-mail address or other Internet-based mechanism, clearly and conspicuously displayed, that a recipient could use to submit a reply e-mail message or other form of Internet-based communication requesting not to receive future commercial e-mail messages from that sender at the e-mail address where the message was received; and

c) failed to include a clear and conspicuous identification that the message was an advertisement or solicitation, failed to provide a clear and conspicuous notice of the opportunity to decline to receive further commercial electronic mail messages from the sender, or failed to provide a valid physical postal address of the sender.

41. Defendants' actions were willful and knowing.

42. As a result of defendants' actions, Microsoft has been damaged in an amount to be proven at trial.

43. Defendants' actions violated 15 U.S.C. § 7704(a)(2), (a)(3) and (a)(5), and entitle Microsoft to injunctive relief, statutory damages and aggravated damages because of defendants' willful and knowingly violation of the CAN-SPAM Act.

**COUNT III  
(Trespass to Chattels)**

44. Microsoft realleges and incorporates by this reference each and every allegation set forth in paragraphs 1 through 43 above.

45. The computers, computer networks and computer services that constitute Microsoft's MSN Hotmail e-mail system are the personal property of Microsoft.

46. Defendants were aware that their actions were specifically prohibited by Microsoft's Terms of Service and/or were on notice that Microsoft did not authorize their actions in any way.

47. Defendants have knowingly, intentionally and without authorization used and intentionally trespassed upon Microsoft's property.

48. As a result of defendants' actions, Microsoft has been damaged in an amount to be proven at trial.

**COUNT IV  
(Conversion)**

49. Microsoft realleges and incorporates by this reference each and every allegation set forth in paragraphs 1 through 48 above.

50. Defendants have willfully interfered with and converted Microsoft's personal property, without lawful justification, as a result of which Microsoft has been deprived of possession and use of its property.

51. As a result of defendants' actions, Microsoft has been damaged in an amount to be proven at trial.

**COUNT V**  
**(Violation of the Washington Commercial Electronic Mail Act (RCW Ch. 19.190) and**  
**the Washington Consumer Protection Act (RCW Ch. 19.86))**

52. Microsoft realleges and incorporates by this reference each and every allegation set forth in paragraphs 1 through 51 above.

53. Defendants initiated the transmission, conspired with one another to initiate the transmission or assisted in the transmission of commercial e-mail messages from a computer located in Washington and/or to an e-mail address that they knew, or had reason to know, is held by a Washington resident. Those commercial e-mail messages:

a) used Microsoft's or another third party's internet domain names without permission;

b) misrepresented or obscured information identifying the true point of origin or the transmission path of a commercial electronic e-mail message; or

c) contained false or misleading information in the subject line.

54. As a result of defendants' actions, Microsoft has been damaged in an amount to be proven at trial.

55. Defendants' actions violated RCW § 19.190.020, and entitle Microsoft to actual damages or statutory damages of \$1,000 per email, whichever is greater.

56. Defendants' actions affected the public interest, are unfair or deceptive acts in trade or commerce and unfair methods of competition, and violated the Washington Consumer Protection Act, RCW Ch. 19.86. Microsoft is entitled to treble damages and an award of its attorneys' fees and costs under that Act.

**COUNT VI**  
**(Violation of the federal Computer Fraud and Abuse Act – 18 U.S.C. § 1030(a)(4), (g))**

57. Microsoft realleges and incorporates by this reference each and every allegation set forth in paragraphs 1 through 56 above.

1           58. By the actions alleged above, defendants knowingly and with intent to defraud,  
2 accessed Microsoft's protected computer system, without authorization and/or in excess of  
3 authorized access.

4           59. By the actions alleged above, defendants furthered the intended fraud and  
5 obtained unauthorized use of Microsoft's protected computer system, and the value of that use  
6 exceeds more than \$5,000 in any 1-year period.

7           60. Defendants' activity constitutes a violation of the federal Computer Fraud and  
8 Abuse Act, 18 U.S.C. § 1030(a)(4), and Microsoft is entitled to damages under that Act.  
9 Microsoft is also entitled under the Act to injunctive and equitable relief against defendants.

10                                   **COUNT VII**  
11           **(Violation of the federal Computer Fraud and Abuse Act – 18 U.S.C. § 1030(a)(5), (g))**

12           61. Microsoft realleges and incorporates by this reference each and every  
13 allegation set forth in paragraphs 1 through 60 above.

14           62. By the actions alleged above, defendants intentionally and knowingly accessed  
15 Microsoft's protected computer system, and knowingly caused the transmission of a program,  
16 information, code, or command, without authorization and/or in excess of authorized access.

17           63. By the actions alleged above, defendants intentionally caused damage, without  
18 authorization, to Microsoft's protected computer system, and the aggregate loss resulting  
19 therefrom exceeds at least \$5,000 in value.

20           64. Defendants' activity constitutes a violation of the federal Computer Fraud and  
21 Abuse Act, 18 U.S.C. § 1030(a)(5), and Microsoft is entitled to damages under that Act.  
22 Microsoft is also entitled under the Act to injunctive and equitable relief against defendants.

23                                   **COUNT VII**  
24           **(Violation of the Lanham Act – 15 U.S.C. § 1125(a))**

25           65. Microsoft realleges and incorporates by this reference each and every  
26 allegation set forth in paragraphs 1 through 64 above.

66. Defendants used the designations "hotmail.com" and "msn.com", which incorporate Microsoft's registered trademarks and service marks and which are words, terms, names, or combinations thereof, or false designations of origin, or false or misleading descriptions or representations of fact.

67. Defendants' activities involved interstate commerce in connection with goods and services.

68. Defendants' conduct is likely to cause confusion, mistake, or deception as to defendants' affiliations, connection, or association with Microsoft, or as to the origin, sponsorship, or approval of their goods or services, or commercial activities.

69. Microsoft has been damaged by these acts in an amount to be proved at trial. Microsoft is also entitled under the Act to injunctive and equitable relief against defendants.

**PRAYER FOR RELIEF**

WHEREFORE, Microsoft respectfully requests that the Court enter judgment against defendants, jointly and severally, as follows:

1. That the Court issue temporary and permanent injunctive relief against defendants, and that defendants, their officers, agents, representatives, servants, employees, attorneys, successors and assignees, and all others in active concert or participation with defendants, be enjoined and restrained from:

a) establishing any accounts with Microsoft's MSN or MSN Hotmail services;

b) using Microsoft's computers and computer systems in connection with sending commercial e-mail messages;

c) making unauthorized use of Microsoft's computers and computer systems;

d) continuing to violate Microsoft's Terms of Service;

1 e) continuing to violate the CAN-SPAM Act of 2003, or the Washington  
2 Commercial Electronic Mail Act; and

3 f) assisting, aiding, or abetting any other person or business entity in  
4 engaging in or performing any of the activities referred to in subparagraphs a) through  
5 e) above.

6 2. That the Court award Microsoft actual damages, liquidated damages and  
7 statutory damages, in amount to be proven at trial;

8 3. That the Court award Microsoft its attorneys' fees and costs incurred herein;  
9 and

10 4. That the Court grant Microsoft such other or additional relief as is just and  
11 proper.

12 DATED this \_\_ day of September, 2004.

13 PRESTON GATES & ELLIS LLP

14 By s/ David A. Bateman

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